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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY et al,
Petitioners,
v.
BURTON S. KNAPP et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
Brief in Opposition to Petition for Certiorari	1-8
Opinions Below	1
Counter-Statement of Questions Presented	2
Court Rule Involved	2
Counter-Statement of the Case	2-4
Argument	2-8

Index of Citations

Appeal of United States Securities and Exchange Commission (C.A. 6, Oct. 19, 1955) 226 F2d 501	1, 2, 3, 6
DuBois v. Kirk, 158 U.S. 58, 39 L. Ed. 895	4
Edwards v. Bay State Gas Co. (D. Del., 1904) 130 Fed 242	6
Eisler v. United States (C.A. D.C. 1948) 170 F2d 273	5
Ex Parte American Steel Barrel Co., 230 U.S. 35, 57 L. Ed. 1379	5
Glendale Electric Fabrics Co. v. Smith, 100 U.S. 110, 25 L. Ed. 547	4
Holland v. Presley (1939) 14 N.Y.S. 2d 83	6
Hurd v. Letts (C.A. D.C. 1945) 152 F2d 121	5
Kennedy v. Emerald Coal & Coke Co. (1943) 21 Del. Ch. 55, 30 A2d 269	6
Knapp v. Kinsey (C.A. 6, May 1, 1956) 232 F2d 458	1, 3
Knapp v. Kinsey (C.A. 6, July 19, 1956) F2d	1, 5, 8

Page

Minnesota and Ontario Paper Co. v. Molyneaux (C.A. 8, 1934) 70 F2d 545 6
Moskun v. United States (C.A. 6 1944) 143 F2d 129 3
Newton v. Consolidated Gas Co., 265 U.S. 78, 68 L. Ed. 909 4
Paper Bag Machine Cases, 105 U.S. 766, 26 L. Ed. 959 4
Reflor v. Lansing Drop Forge Co. (C.A. 6, 1942) 124 F2d 440 6
Shea v. United States (CCA 6, 1918) 251 Fed. 433 6
United States v. Flegenheimer (D. C. N.J. 1935) 14 F. Supp. 584 5

Court Rule

Rule 23(3) of Court of Appeals (6th Circuit) 2,3

Page

6
5

4

4

6
6

5

2,3

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Opinions Below

Appeal of United States Securities and Exchange Commission (C. A. 6, Oct. 19, 1955), 226 F 2d 501 re evidence and contempt of court; nine printed copies filed herewith.

Knapp v. Kinsey (C. A. 6, May 1, 1956), 232 F 2d 458—the appeal in chief; printed copies filed by petitioners.

Knapp v. Kinsey (C. A. 6, July 19, 1956, ... F 2d .....—on motion for rehearing. Not yet officially reported; printed copies filed by petitioners.

Counter-Statement of Questions Presented

The Court of Appeals has awarded the usual costs to the prevailing party. The question is whether, for some reason peculiar to this case, this was such an abuse of discretion as to justify review in this Court. No one doubts that the Court of Appeals had the power to award costs as it did, or that it had the power to disallow costs if its discretion had so inclined it.

Court Rule Involved

Rule 23(3) of the Court of Appeals for the Sixth Circuit provides:

> "(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the Court."

Counter-Statement of the Case

Plaintiffs below, petitioners here, sought to acquire control of Monroe Paper Products Company. Opposing stockholders organized a voting trust. When about 52% of all the stock was deposited in the voting trust, plaintiffs began this suit against the voting trustees and others to have the voting trust declared to be unlawful upon various theories. This was a supposed cause of action personal to the plaintiffs. They joined with it a supposed derivative cause of action charging the defendants with mismanagement, misappropriation of corporate funds, and poor business judgment (16a-51a). Plaintiff Kinsey admitted that the so-called derivative claim was incidental to the attempt to break up the voting trust (896a). The Securities and Exchange Commission described the suit as

> "a phase of a struggle for control of the Monroe Paper Products Company * * * between Monroe

> local management and the Waterbury Corrugated Container Corporation, a Connecticut corporation in the same line of business." (Commission's Brief, pp. 1-2, on its appeal, 226 F 2d 501)

Throughout an eight-month trial there was a long series of unusual maneuvers by the plaintiffs, extraordinary rulings and actions by the District Judge, and of unavailing protests and exceptions by defendants. See the detailed narrative in the Court of Appeal's opinion on the preliminary appeal taken by the Securities and Exchange Commission from the sixty-day jail sentence imposed on its general counsel, 226 F2d 501, and the further narrative in the opinion on the main appeal, 232 F2d 458. Eventually the District Court on August 4, 1955, entered a judgment dissolving the voting trust and finding defendants liable for $306,982.62 (323a-324a).

Defendants were advised that such judgment appeared to be erroneous in point of law, contrary to the great weight of the evidence, and the product of judicial bias and prejudice. An appeal was therefore taken the next day and within a week all these complaints were reiterated to opposing counsel and were laid before the Court of Appeals in connection with the application for supersedeas. A record presenting all these errors was duly prepared and filed, and all the questions were fully briefed and argued by both sides.

On May 1, 1956, the Court of Appeals reversed the judgment and ordered a new trial before a different judge (232 F2d 458). Judicial bias and prejudice was the ground on which the decision was rested. The effect of this opinion was to allow defendants (appellants in the Court of Appeals, respondents here) to tax as costs their supersedeas bond premium, their cost of printing their appendix, and the clerk's docket fee, amounting to $11,256.70. This was

in accordance with settled practice and the Sixth Circuit Rule 23(3).

The plaintiffs (appellees in the Court of Appeals, petitioners here) acquiesced in the reversal of the judgment but by petition for rehearing they sought to have the Court of Appeals exercise its descretion and withhold the taxation of costs. This the Court of Appeals declined to do its ruling being embodied in a supplemental opinion handed down July 19, 1956, and not yet printed in the Federal Reporter.

The present petition for certiorari offers no defense for the original judgment and does not question the correctness of the decision reversing it. The sole review sought is as to the discretionary ruling on costs.

Argument

Heretofore this Court has consistently declined to review cases which present no question except that of the discretionary award of costs:

> *Newton v. Consolidated Gas Co.*, 265 U.S. 78 at 83; 68 L. Ed. 909:
>
> "The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them, and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed."
>
> *Paper Bag Machine Cases*, 105 U.S. 766, 26 L. Ed. 959;
>
> *DuBois v. Kirk*, 158 U.S. 58, 39 L. Ed. 895;
>
> *Glendale Electric Fabrics Co. v. Smith*, 100 U.S. 110, 25 L. Ed. 547.

The present petition for certiorari seems to suggest only three theories as to why the Court of Appeals might have exercised its discretion differently—that the question of judicial bias and prejudice could have been presented to the court at an earlier date on a smaller record; that there ought to be a special rule about costs in a stockholders' derivative action; and that the errors for which the case was reversed were more the fault of the trial judge than of the petitioners. Our answer to these claims is as follows:

1. The District Judge's attitude, which the record has obliged the Court of Appeals to call bias and prejudice, was not known—that is, not known to us—until after the trial began, and it was demonstrated by a series of rulings and of acts occurring throughout the trial. Appeal after the trial was therefore the correct remedy. As the Court of Appeals has held (*Knapp v. Kinsey*, F2d ; opinion of July 19, 1956, not yet reported, p. 2):

> "Under the circumstances the remedy cannot be by a change of judges during the trial; it necessarily becomes a matter of alleged prejudicial error and for correction by the Court of Appeals. *Moskun v. United States*, 143 F2d 129, C. A. 6th; *United States v. Flegenheimer*, 14 F. Supp. 584, 591; D.C. N.J. We do not agree with appellees' contention that the issue was not timely raised and preserved by appellants during the trial in the District Court."

This is sustained by the following decisions in addition to what the Court cites:

Ex parte American Steel Barrel Co., 230 U.S. 35, 57 L. Ed. 1379;

Eisler v. United States (C.A. D.C. 1948), 170 F2d 273;

Hurd v. Letts (C.A. D.C.), 152 F2d 121 (relied on by petitioners);

Refior v. Lansing Drop Forge Co. (C.A. 6, 1942), 124 F2d 440;

Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8, 1934), 70 F2d 545;

Shea v. United States (CCA 6, 1918), 251 Fed. 433.

And the court below expressly finds, on the same page of the same opinion, that our printed appendix was not unreasonably large:

> "Nor do we find any fault on the part of appellants in preparing and presenting an appendix of approximately 4400 pages which presented the issues on the merits as well as the issue of the judgment being invalid because of alleged bias and prejudice. Although the case was not decided on its merits and the major portion of the appendix was not needed by the Court, it would have been needed if it had become necessary to consider the case on the merits. It is to be noted that appellees filed their own separate appendix of approximately 2700 pages which likewise presented the issues on the merits."

2. In a stockholders' derivative action the unsuccessful plaintiffs are usually liable for the costs just as in any other case:

Edwards v. Bay State Gas Co. (D. Del. 1904), 130 Fed. 242;

Kennedy v. Emerald Coal & Coke Co. (1943), 27 Del. Ch. 55, 30 A2d 269;

Holland v. Presley (1939), 14 N.Y.S. 2d 83.

The present case is only in part and superficially a derivative action, as has been shown above. Finally, the point is raised for the first time in this Court.

3. Petitioners' conduct during the trial and on appeal makes it highly equitable that they should reimburse us for our taxable appeal costs. It is of course true that they

did not appoint the District Judge to the bench, but in large part the erroneous behavior of the trial judge was advised by, or enthusiastically adopted by, the petitioners. They prolonged the proceedings by continually calling, excusing, and recalling witnesses, and leading the trial court into digressive colloquies. They introduced into the case the campaign against the Securities and Exchange Commission described in 226 F2d 501, and by their own admission they thereby prolonged the trial at least six weeks (3180a-3181a). They endorsed the exclusion from the trial of the defendant corporation's attorney of record (2157a). They advised the trial judge against the entry of orders which might be appealable (3656a, 3934a). As to the threats and attempts at intimidation of parties and witnesses which are so prominently mentioned by the Court of Appeals, petitioners originated some and approved others (2636a, 3136a, 3156a, 3366a, 3382a, 3435a, 3436a). Their attorney sat with the judge in private conference for the drafting of papers (3363a-3364a). When judgment was entered and respondents applied for supersedeas, petitioners' counsel opposed the application and demanded that any supersedeas bond be fixed at not less than $350,000. On petitioners' representation that they could sustain the judgment, respondents were required to post a very substantial bond, the cost of which petitioners now object to paying. In all of their appearances before the Court of Appeals, petitioners defended the trial judge's conduct and asked that his judgment be affirmed. Failing in that they now ask to be excused from paying respondents' costs necessarily incurred in bringing about reversal. The Court of Appeals gave this question careful study. It had already decided two appeals in the matter, both with large printed records in addition to the original papers. Voluminous briefs had been furnished, and twice there had

been lengthy oral arguments. Against this background the appellate court exercised its discretion against petitioners, saying (*Knapp v. Kinsey*, ... F2d ; Opinion of July 19, 1956, p. 3):

> "We do not find in this case sufficient reason for departing from the usual rule of awarding costs in full to the prevailing party."

These taxable costs ought to be paid. The petition for certiorari does not present any meritorious question.

Dated: Detroit, Michigan,
September 25, 1956.

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PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF

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TABLE OF CASES CITED

	Page
Eisler v. United States (CA D.C.), 170 F 2d 273	3
Ex parte American Steel Barrel Co., 230 US 35, 57 L ed 1379	2
Hibdon v. United States (CA 6, June 2, 1956), 235 F 2d 49	1, 3
Hurd v. Letts (CA D.C.), 152 F 2d 121	3
Knapp et al v. Kinsey et al, 235 F 2d 129	1
Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8), 70 F 2d 545	3
Moskun v. United States (CA 6), 143 F 2d 129	2
Refior v. Lansing Drop Forge Co. (CA 6), 124 F 2d 440	3
Shea v. United States (CCA 6), 251 Fed. 433	4
United States v. Flegenheimer (DC N.J.), 14 F Supp 584	2

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Knapp et al v. Kinsey et al (petition page 1) is now reported in 235 F 2d 129.

Not only does the decision of the Court of Appeals that the disqualification statute (28 USC § 144) is inapplicable conflict with decisions of other federal courts as pointed out in the petition, but apparently it conflicts with the very recent decision by the same court in *Hibdon v. United States* (CA 6, June 2, 1956), 235 F 2d 49. In affirming a criminal sentence despite a charge of bias and prejudice of the trial judge the Court there said:

> "There was no petition or affidavit of disqualification presented either before *or during* the trial." (italics added)

Surely it would be no reason to refuse reversal for failure to file such a petition or affidavit during the trial if such filing was not required in order properly to raise the question.

Respondents contend that there was no manifestation of prejudice until after the trial began and that therefore no affidavit of prejudice was required and the matter of disqualification was reviewable on appeal from the resultant judgment. Petitioners contend that proper procedure requires the making of a formal charge of disqualification when the prejudice appears and that such charge is a requirement precedent to recusation, voluntarily made or compellable, and to review on appeal from a judgment entered by the judge whose right to try the case was thus challenged.

The following cases, cited by the Court of Appeals, do not support its view that the statute did not require respondents to file an affidavit of prejudice in the instant action:

Moskun v. United States (CA 6), 143 F 2d 129. The flare-up by the district judge was during rehearing on a naturalization petition and was simultaneous with the denial of the petition.

In *United States v. Flegenheimer* (DC N.J.), 14 F Supp 584, an affidavit of prejudice was filed and considered to be inadequate.

The same is true of the following additional cases which respondents tender in their brief, pages 5-6.

Ex parte American Steel Barrel Co., 230 US 35, 57 L ed 1379, in which the district judge stepped aside upon the

filing of an affidavit that he was prejudiced. This Court refused mandamus to review the designation of another judge by the Circuit Judge.

Eisler v. United States (CA D.C.), 170 F 2d 273, in which an affidavit of prejudice was filed, and its sufficiency and timeliness were passed upon by the trial judge whose ruling thereon was affirmed upon appeal from the appellant's conviction.

Hurd v. Letts (CA D.C.), 152 F 2d 121, in which an affidavit of prejudice, filed when the trial was near conclusion, was passed upon by the trial judge and found to be insufficient. The appellate court denied prohibition, reserving the question for determination if raised on an appeal from any judgment resulting from the trial. In effect the court held that the disqualification statute applied even when the claimed prejudice was first manifested during the trial, because it ruled that the filing of an affidavit of prejudice under the statute was not restricted to filing before trial—which appears to be the right view.

Refior v. Lansing Drop Forge Co. (CA 6), 124 F 2d 440, expressly recognized that the statute permits the filing of an affidavit of prejudice after trial has begun, if failure to file it earlier is excusable. There such an affidavit was filed, its sufficiency was ruled upon by the trial judge and his ruling against disqualification was affirmed on appeal. This decision squares with petitioners' contentions herein and with the recent decision of the same court, *Hibdon v. United States*, page 1, ante.

Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8), 70 F 2d 545, in which an affidavit of prejudice was filed without any showing of good cause for filing it within less than 10 days before the beginning of the term, as prescribed by the statute. The trial judge held the affidavit was un-

timely filed and otherwise insufficient as to the statement of facts. The court affirmed on these grounds and also because no special circumstances existed justifying the writ.

Shea v. United States (CCA 6), 251 Fed. 433, in which the Court of Appeals had ordered a retrial of a criminal case but the mandate was not filed in the trial court until after the first day of term. Jurors for the retrial had been summoned and 2 days before the date set for trial an affidavit of prejudice was tendered for filing. The judge rejected it as not timely tendered and, on appeal from the defendant's conviction, the Court of Appeals affirmed saying:

> "* * * Assuming, however, * * * that it could not have been filed before the mandate went down, it clearly could and should have been filed at the nearest available time thereafter. * * *"

Thus the Court recognized the right and duty to file an affidavit of prejudice at any time if the delay in filing is excusable.

The Court of Appeals in the instant case committed a fundamental error in holding that no affidavit of prejudice need be filed if the prejudice is manifested after the trial has commenced and that error led the Court to conclude that it had the right, as a matter of discretion, to impose upon petitioners liability for the entire costs of the appeal. Petitioners' reply is that no such power exists, but if it does the Court's determination was, under the circumstances, inequitable and an abuse of judicial discretion. Under such circumstances petitioners contend that the misinterpretation of the statute and the wrongful allowance of costs should be corrected.

We offer no apology for not imposing upon this Court consideration of a petition for certiorari on the main decision ordering a new trial. The basis of that decision is that the proceeding was no trial because of bias and prejudice of the presiding officer. It is that fact, thus established, upon which petitioners base their contention that under the circumstances they should not be made to pay respondents' costs on the appeal.

Respondents' contentions that the allowance of costs was justified because of the conduct of petitioners' counsel seem to be answered by the fact, determined by the Court of Appeals, that petitioners' counsel were not responsible for the conduct of the trial judge.

Respectfully submitted,

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October 9, 1956.